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IN THE

Supreme Court of the United States

No. 88—October Term, 1922

FRED BROWNE ..... Petitioner

vs.

CHARLES B. THORN, WILLIAM T. MaGINNIS, SAMUEL C. COLEMAN, and MILES J. KEHOE, Partners, Doing Business as Thorn & Maginnis ..... Respondents

BRIEF OF RESPONDENTS

JOS. E. JOHNSON,
of Atlanta, Georgia;
L. C. GOING,
of Memphis, Tenn.;
BEN CRAVENS & IRA D. OGLESBY,
both of Fort Smith, Arkansas,
Counsel for Respondents.

INDEX

	Page
Statement of the Case	5
Petitioner is precluded now from raising any question as to the validity of any part of the Cotton Futures Act	10
If the Act is unconstitutional it is entirely so and the tax feature disappears with the rest	12
A stop order contemplates a telegram stop ten at 17.20 and ten at 17.15 means, according to the rules and customs of the New Orleans Cotton Exchange, to sell at the opening of the market at the above prices, if possible, or the next best possible price	14
Sellers slips and buyers slips showed a compliance with the United States Cotton Futures Act	21
The meaning of the words "The Party to be Charged"	22
Under the Treasury Regulations the contracts complied with Section 5 of the Act of Congress	12
The contracts are legal under the Cotton Futures Act as well as under the New Orleans Cotton Exchange	12, 14, 26, 43
The undisputed evidence shows that respondents intended delivery of the cotton and that petitioner was familiar with the rules and regulations of the Exchange	16-24
Respondents did not know of petitioner's intention not to receive or deliver cotton	24

Page

The Court did not commit error in charging the jury that the intention not to deliver must exist in both petitioner and the respondents 18

It was a Louisiana contract and legal under the laws of that state 28

The United States Court will enforce a contract if legal where made, even though petitioner deposited money in Arkansas to the credit of respondents 28

The Court did not err in holding that hedging contracts were legal and enforceable 38

The Court did not commit error in refusing petitioner's instruction No. 7 38

The Court did not commit error in refusing defendant's request No. 8 39

The Court did not commit error in refusing petitioner's instruction No. 13 40

The Court did not commit error in refusing petitioner's instruction No. 14 35, 41

The Court did not commit error in refusing petitioner's instruction No. 15 38

The Court did not commit error in directing a verdict against petitioner's counterclaim 40

Explanation of business conducted on New Orleans Cotton Exchange 41

Discussion of "set offs" 43

Discussion of "ring outs" 43

Discussion of "close outs" 43

Difference between speculation and gambling 47

The Act of Congress does not prohibit speculation, but approves it 54

Table of Cases Cited

Wilhite vs. Houston, 200 Fed. 390;
Taylor vs. Bailey, 48 N. E. 200;
Bibb vs. Allen, 149 U. S. 481;
Browne vs. Thorn, 272 Fed. 950;
Thorn vs. Browne, 257 Fed. 519;
20 Cyc. 272, and note;
Vance vs. Newman, 72 Ark. 395;
Century Digest, page 2286;
Brown on Statute of Frauds, Section 365;
Lee vs. Vaughn Seed Store, 101 Ark. 69;
79 Central Law Journal, 339;
Bangs vs. Hornick, 30 Fed. 97;
Cleige vs. Laidley, 149 Fed. 346;
Bond vs. Hume, 243 U. S. 15;
Warten vs. Brown, 249 Fed. 48;
Berry vs. Chase, 146 Fed. 625;
Conner vs. Robertson, 55 Am. Rep. 521;
Springs & Co. vs. Carpenter, 154 Fed. 487;
Flower vs. Bush, etc., 254 Fed. 519;
Pierce Oil Corp. vs. Taylor, 264 Fed. 829;
Rountree vs. Smith, 108 U. S. 269;
Chicago Board of Trade vs. Cristie, etc., 198 U. S. 236;
Lehman vs. Feld, 37 Fed. 852;
Board of Trade vs. Kinsey Co., 130 Fed. 507;
9 Corpus Juris 529;
Horton vs. Morgan, 75 A. D. 321;
Higgins vs. McCrea, 116 U. S. 671;

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Counsel for Respondents.

STATEMENT OF THE CASE

It is perhaps natural that counsel for petitioner should have colored his statement of facts to suit his needs. One can find excuses for such pardonable human failing. But in this case he has exceeded all bounds, and we believe has vio-

lated, perhaps inadvertently, the duty he owes this Court as a member of the bar. His statement of facts fairly bristles with material omissions, inaccuracies and unwarranted inferences. Below we point out some of them in order that the Court may be advised that it will be compelled to go to the record for an accurate statement of the facts.

Take, for instance, the opening statement on page 8 of his brief.

"The petitioner was a farmer and stock raiser, living at Crowder, Oklahoma, prior to his moving to Fort Smith, Arkansas."

This statement omits the fact that petitioner was engaged in the mercantile business at Crowder, Oklahoma (569), and that he was also engaged in the business of buying spot cotton; that he is the president of the Browne-Hinton Wholesale Grocery Company of Fort Smith; that he owns a three-story building in Fort Smith, Arkansas (632), and that he has more than 1,000 acres of land in cultivation (633). The significance of the omissions that petitioner was a merchant and had been engaged in buying and selling spot cotton probably lies in the hope that a plea of wagering would gain more sympathy for a mere farmer and stock raiser than it would for a merchant and spot cotton dealer.

Take the very next statement on page 9 of the brief.

"Prior to the future dealings involved in the controversy, petitioner had made two small deals in cotton futures, one several years before these transactions, and the other only a short time before." And yet, on cross-examination, petitioner admitted that on the very day the loss in controvery was made, he "had some deals with H. & B. Beer, members of the New Orleans Cotton Exchange, and lost money on cotton contracts he had with them." (R. 643.)

As an example of an unwarranted inference stated so as to leave the impression of a fact, consider the following sentence on page 10 of his brief:

"The petitioner, according to his statement, had a net worth of something like $25,000.00 being a hundredth part of the price of the cotton he had bought." (R. 578.)

We search the record on page 578 in vain to find any reasonable basis for this assertion. What we do find is a refusal of petitioner to state what his worth was, explaining the difficulty he would have in doing so, and then this colloquy:

"Q. State whether you had means enough to buy and pay for the amount of cotton that these contracts that were bought, called for?

"A. I don't suppose I had enough to pay for a hundredth part of it, as far as that is concerned, of all that cotton." (578.)

From this answer counsel for petitioner draws the absurd deduction that petitioner was worth $25,000.00, and states it as a fact to this Court. We might just as well say that petitioner is worth a million dollars, basing it upon his admissions on cross-examination, such as his ownership of a three-story business house on Towson Avenue in Fort Smith, Arkansas, his presidency of the Browne-Hinton Wholesale Grocery Company, and his six farms near Crowder, Oklahoma, with more than one thousand acres in cultivation. But our conclusion would be no more justified by the record than the ridiculous conjecture of petitioner's counsel. From our point of view, the financial worth of petitioner is somewhat immaterial, but from the standpoint of petitioner's counsel it is very material. The lower he can figure it, the better it supports his contention that his client was too poor a man to buy and sell the cotton he actually bought and sold.

Again, on page 10 of his brief, he states:

"At 8:30 on the morning of February 1, the petitioner sent a telegram to the respondents directing them to sell one thousand bales of his long cotton at 17.20 cents per pound, and one hundred bales at 17.15 cents per pound."

He neglects to state that this is only his own interpretation of the telegram, but sets it down as if the telegram had no other meaning. And this subterfuge is employed in all the many discussions of the telegram that takes place in various parts of his brief, with the single exception of his final words on page 127. As a matter of fact, the telegram did not use the word "sell" at all, but used the word "stop," which word meant not only "to sell at the prices named, if possible, and if they could not execute it at the figures mentioned they are to execute it on the market at the best possible price." (397.)

Petitioner admits he became more and more acquainted with the terms used about sending telegrams. His knowledge of the meaning of the telegram was a controverted fact, but we established his knowledge of the meaning of the term by the overwhelming weight of the evidence, to say nothing of having put it out of the case here by the verdict of the jury. Of course, if counsel for petitioner had stated the facts as established by the record, this Court would hardly have had the patience to follow his elaborate argument built upon a false premise. These are not all the inaccuracies he has fallen into, but they are sufficient to show the Court that no confidence can be placed in his alleged "Statement of Facts."

I

Petitioner is precluded now from raising any question as to the validity of any part of the Cotton Futures Act, as the validity thereof was not raised by his pleadings in the Trial Court as shown by his answer (17-21.) Nor was any contention of this kind made either in the Trial Court or in the Circuit Court of Appeals. Petitioner did not rely as a defense to respondent's cause of action on the invalidity of the Cotton Futures Act, and the defense set up here is an afterthought, and one arising since this Court decided the case of Hill vs. Wallace. Further on this point, we call attention to the fact that petitioner in his answer relied as a defense upon the fact that the contracts made by respondents for him, did not comply with the Cotton Futures Act, and set out therein specifically wherein he claimed the Act was not complied with (17-21). As further proof that petitioner neither plead nor relied upon the invalidity of the Act, we call attention to the colloquy between the Trial Court, and counsel for petitioner, which is as follows:

"The Court: Have you the record of this case before? At this point, I would like to ask what defense you rely upon, Mr. McDonough?

"Mr. McDonough: I rely upon three defenses, Your Honor, as I construe the answer. First, that

these contracts as offered do not comply with the United States Cotton Futures Act; and then, second, which will make another defense, that they do not comply with the United States Treasury regulations on the subject; third, that the transactions are void because they were dealing in the rise and fall of prices and not intending to deliver the cotton; and, fourth, that the telegram of February 1st did not authorize plaintiffs to sell the cotton at 14 cents." (p. 52.)

Counsel, in answering the Court's question as to what defenses he relied on, stated four defenses. The first, third and fourth of which are raised by his answer, but the second ground of defense can not be relied upon as it was not set up in his answer and the Court's attention and counsel for petitioner's attention was called to this fact at the time (53). No mention is made in petitioner's answer of failure of contracts to comply with the United States Treasury regulations. It is now too late to raise this question and we think that this Court will consider neither the contention now made for the first time that the Cotton Futures Act, or any part thereof, is invalid, nor to a defense which was not pleaded that the contracts violated the United States Treasury regulation. Petitioner's contention that certain sections of the Cotton Futures Act are unconstitutional and invalid, leaving only the taxing feature valid, cannot

be raised for the further reason that any objection as to the unconstitutionality of the Act should have been raised by him and presented by him in clear terms to the first Court, which, in this case, was the Trial Court, and having failed to do so this question is held to be waived. We call attention further to the fact that no assignment of error made by petitioner raises this question.

Counsel for petitioner's contention that the Cotton Futures Act is made invalid in all except its taxing features by the Hill case, should not be seriously considered. He insisted in the Court below that the respondents had laid themselves liable to the tax in Section 3 by violating Section 4, and now he claims that Section 4 is unconstitutional, thus reversing the ground he took in the Court below. If the Act is unconstitutional, it is entirely so, and the tax feature disappears with the rest. The inconsistency of the position of the petitioner is made manifest when we read Section 3 of the Act, as follows:

"Section 3.

"That upon each contract of sale of any cotton for future delivery made at, on, or in any Exchange, Board of Trade, or similar institution, or place of business, there is hereby levied a tax in the nature of an excise tax of two cents for each pound of the cotton involved in any such contract."

The first paragraph of Section 5 is as follows:

"Section 5.

"That no tax shall be levied under this Act on any contract of sale mentioned in Section 3 hereof, if the contract comply with each of the following conditions," etc.

Petitioner takes the position that the contract by respondents for petitioner were void because the excise tax was not paid. It is plainly manifest that Congress had no intention of levying a tax of two cents per pound on any contract for sale or purchase and future delivery of cotton when the contract conformed to the requirements of Section 5.

A comparison of the provisions of the United States Cotton Futures Act with the provisions of the Future Trading Act before this Court in the Hill case, make it manifest that the Act as a whole cannot stand, and particularly Section 3, unless Section 5 is also retained. In the Hill case, Section 3 imposed a tax of 20 cents a bushel on "puts and calls." It was the purpose of Congress to prohibit these pure options, and when the Court intimated that Section 3 was not affected by its conclusions respecting Section 4, it did no violence to the intent of Congress. But were the Court to hold Section 3 of the Cotton Act valid, and the rest of it invalid, it would be an unconscionable piece of

judicial legislation. It would create a result never intended by Congress and in effect would be the making of a new law by the Court. In its intent Section 4 of Grain Futures Act is analagous to the entire Cotton Futures Act. Both seek to regulate futures by threat of taxation. No doubt the Court will, in a proper case, hold the Cotton Futures Act unconstitutional, but when it does, it will kill the taxing feature of it as well as the regulatory sections, because it can be plainly seen that the tax is an inseparable part of the scheme to regulate.

II

Counsel for petitioner contends that respondents were not authorized to sell two thousand bales of May cotton at fourteen cents on a telegraphic order directing the sale of one thousand bales at 17.20 cents and one thousand bales at 17.15.

The telegram above referred to did not order respondent to "sell." It reads as follows:

"Stop ten at seventeen twenty and ten at seventeen fifteen." (R. 65.) Which means, according to the rules and customs of the New Orleans Cotton Exchange, to sell one thousand bales of May cotton at 17.20 cents and one thousand bales of May cotton at 17.15 cents, at the opening of the market on February 1st, 1917, at the above price if possible, or the next best possible price. It was

not denied by petitioner that such was the rule and custom of the Exchange, but his counsel argues that he should not be bound by rules or customs of that Exchange.

Respondents Kehoe, Coleman and Thorn testified that the above telegram was executed in accordance with the rules of that Exchange. Witness Barkdull, a cotton man of Fort Smith, Arkansas, with whom petitioner talked a great deal, testified that "if the telegram was received before the market opened it would not be the duty of the broker to wire his customer anything. His only duty was to attempt to execute the order if the market opened at a price less than the price stated in the telegram the broker must sell it on the opening of the market at the best possible price." (R. 397.)

The market on February 1st, 1917, opened at 14.50, then 14.00, 13.80, 13.75 and 13.00.

While petitioner admits that he did not think or care anything about the rules of the Exchange (R. 640) the telegrams introduced in evidence alone clearly show that he was familiar with the customs, rules and regulations of the cotton trade. If the telegrams show nothing as to his knowledge of the custom, his own testimony conclusively shows that he was familiar with the terminology and customs of that Exchange.

Petitioner testified that he was in the Fort

Smith Cotton Exchange a good deal of the time looking at the quotations, and sent telegrams from there (R. 639); that he had cotton transactions with the New Orleans Cotton Exchange prior to September 22nd, 1916 (R. 57), and on the last mentioned date dealt in cotton trades with respondents, which transactions required a deposit by him of one thousand dollars; from September 22nd, 1916, to February 1st, 1917, he dealt in large quantities of cotton, and on February 1st, 1917, he had other cotton trades with H. & B. Beer, members of the New Orleans Cotton Exchange (R. 643). He admits he received, read and understood the confirmation slips sent him by respondents (R. 635); he understood **that all sales were subject to the by-laws, rules and regulations of the New Orleans Cotton Exchange** (R. 636); he found out "pretty quick" what "stop" meant (R. 641).

While counsel for petitioner seriously asserts that his client had no knowledge of the custom of the Exchange authorizing respondents to execute stop orders at any other figures than those given by petitioner in his telegram of February 1st, 1917, petitioner admits that after December 29th, 1916, **he knew that it was not always possible to execute stop orders at the figures given.**

Petitioner testified as follows:

"Q. How soon after you got into the market did you learn about stop

"A. I could not say.

"Q. About how long?

"A. Oh, it was not long.

"Q. Just two or three days?

"A. I found that out pretty quick.

"Q. Now you sent that telegram some where in January telling them to close out or to sell the same cotton, or something like that, and they wrote you that they could not stop at that point. Was that the first informaiton you ever had that they could not stop when you said stop? This is the letter of December 29th. This letter reads: 'We beg to confirm telegrams passed between us today. We wish to refer you to your wire asking why your stop order, sell two hundred May at seventeen nineteen was executed at seventeen five.' Now at this time did you not know that it might be impossible to execute your order at the very figure you said?

"A. I don't know that I did.

"Q. Then you knew it from that time on, did you not?

"A. I knew it from that time on. I say before this, yes." (R. 641.)

If on February 1st, 1917, when the market opened at 14.50, respondents had taken the occa-

sion to have wired back to petitioner at Fort Smith, advising him of the market and failing to hear from him had sold his cotton contracts at the lowest figure reached by the market that day, 13.00, then there would have been some cause for complaint upon petitioner's part for not having executed his order according to the rules and customs of the Exchange, but having sold his contracts in accordance with said rules for the best price obtainable, they simply acted for him in good faith and contracted with reference to a subject matter concerning which the usage or custom prevailing he is not only presumed to have known, but according to his own testimony he did know from December 29th, 1916.

As was said by Judge Hook in Wilhite vs. Houston, 200 Fed. 390:

> "An order from a customer to a broker to be executed upon a board of trade contemplates conformity to the rules and customs which prevail there."
>
> "One employing another to act for him in buying or selling in a certain market will be held as intending that the business should be conducted according to the general usages and customs of that market; and this is the rule, whether or not he in fact knows of the custom."
>
> *Tailor* vs. *Bailey,* 48 N. E. 200.

Since petitioner admits he knew that it was

not always possible to execute a stop order at the price given, the instant case falls within the well established doctrine laid down in the Bibb case, which is as follows:

> "It is settled by the weight of authority that where the principal sends an order to a broker engaged in an established market or trade, for a deal in that trade, he confers authority upon the broker to deal according to any well established usage in such market or trade, especially when such usage is known to the principal, and is fair in itself, and does not change in any essential particular, the contract between the principal and agent, or involves no departure from the instructions of the principal; provided the transaction for which the broker is employed is legal in its character, and does not violate any rule, law, good morals or public policy."

See also the opinion of Judge Johnson in Browne vs. Thorn, 272 Fed. 950.

Petitioner's subsequent conduct in failing to make the slightest objection to the manner in which his contracts were disposed of, his failure to deny liability on the theory that his own agents had abused the trust imposed in them, his subsequent offer to pay one-tenth cash and the balance in equal annual installments, clearly show that his assumed plight of "injured innocence" is an afterthought manufactured for the occasion.

III AND V

Counsel for petitioner urges that "under the Treasury regulations the authorized contracts do not comply with Section 5 of the Act of Congress." This question was before the Court of Appeals at the first trial and decided adversely to petitioner's contention. Said the Court:

> "These slips contain agreements of sale, purchase and delivery of cotton futures 'subject to the by-laws, rules and conditions of the New Orleans Cotton Exchange and subject to the United States Cotton Futures Act' and Section 3, Rule 1 (15) of the Cotton Exchange provides in effect that verbal contracts 'shall have the same standing, force and effect as written ones (if notice in writing conforming to the requirements of Section 4 of the United States Cotton Futures Act) if such contract shall have been given by one of the parties thereto to the other party during the day on which said contract was made or the next day thereafter,' but a verbal contract may lawfully precede a written contract in the purchase or sale of cotton futures under the Act of Congress, and these slips provide that the contracts they evidence shall comply with both the Cotton Futures Act and the rules of the Exchange. There is nothing in the rules of the Exchange cited which prohibits or is inconsistent with such a compliance. The legal presumption is that these contracts were made in accordance with the provisions of both. All that the Cotton Futures Act requires is that the contracts of sale shall be evidenced by written memoranda signed by the parties to be

charged. These contracts are so evidenced, and even if they were verbal contracts before they were evidenced by a writing or the written memoranda. Yet, when they were evidenced thereby within a day or two after the bids were made which preceded the contract they were as complete a compliance with the Cotton Futures Act as they would have been if the written memoranda had been made a few hours earlier. Nothing in contradiction of or inconsistent with Section 5 of the Act, or with the compliance therewith, is found in the rules of the Cotton Exchange the buyers and sellers slips or in the sales or purchases they evidence."

Thorn vs. *Browne*, 257 Fed. 519.

And further the Court says:

"There is another reason why the sellers' slips and the buyers' slips signed by the respective parties to be charged were admissible in evidence and would have proved the purchase and sale in the absence of countervailing evidence even if the Cotton Futures Act had required the execution of a buyer's slip and a seller's slip for each transaction, as does Rule 47 of the Cotton Exchange, and that is that the introduction of one of the corresponding slips under such a requirement raises the legal presumption that the corresponding slip in the same terms mutatis mutandis was also executed and delivered, a presumption which ought to and will prevail in the absence of proof to the contrary. Hawes vs. Forster, 1 Moody & Robinson 368, 371, 374; Parton vs. Crofts, 16 C. B. Reports (N. S.) 11, 13, 14, 21; Benjamin on Sales, Fifth Ed., 289, 297, 303, and inasmuch as when one of these slips is

> offered in evidence, the legal presumption is that the corresponding slip expressed the same terms of the sale as those specified in the slip offered (see authorities supra) and the plaintiffs were competent witnesses to prove the fact that they signed slips corresponding to those offered in evidence and delivered them to the other parties to the respective contracts at the times of the respective transactions, it was error to exclude their testimony to that effect."

Counsel for petitioner argues at great length that the Court of Appeals took an erroneous view of the meaning of the words "the party to be charged," and that "under the Treasury Regulations, the offered contracts do not comply with Section 5, of the Act of Congress."

Respondents are not suing to enforce the contracts, but for money paid out for the petitioner's use. The contracts admitted in evidence are "signed by the party to be charged," to-wit, the purchaser, Amy and Strouse, and other members of the Cotton Exchange. This was a full and strict compliance with the Cotton Futures Act. The Act does not require both parties to sign the contract. If it so intended, it would have required the contract to be signed by each party thereto. If Amy and Strouse had refused to receive the cotton bought and to pay for same, and respondents had sued them upon the contract, they could recover. In that event Amy & Strause was the party to be

charged. They could not defend on the ground that Thorn and Maginniss did not sign the contract. All that Section 12 of the Act means is, if a plaintiff seeks to enforce a contract for the sale of cotton for future delivery, in the Courts of the United States, he must show a contract which gives the quantity, the names and addresses of the seller and buyer, which contract shall be signed by the party to be charged, that is, the party against whom the plaintiff is seeking to enforce liability.

> "The party to be charged is the one against whom the contract is sought to be enforced."
>
> 20 Cyc. 272 and Note. See also *Vance* vs. *Newman*, 72 Ark. 395. *Century Digest*, p. 2286 where cases are collected. *Browne on Statute of Frauds*, Sec. 365.
>
> *Lee* vs. *Vaughn's Seed Store*, 101 Ark. 69.

It was a valid contract by respondents for their undisclosed principal. They paid out money at his instance in making the sale for him and he is bound. We invite the Court's attention to 79 Central Law Journal, page 339, where this question is ably discussed by counsel for petitioner, and in which he vigorously maintains, as correct, the principle invoked by respondents. The Court's attention is also called to the very able opinion rendered by the Court of Appeals, through Judge San-

burn, in *Thorn* vs. *Browne*, 257 Fed. 519, on this question.

VI

Counsel's contention that the offered contracts are illegal under the Cotton Futures Act, as well under the rules of the New Orleans Cotton Exchange, is discussed under another title of this brief.

VII

It required thirty-six pages for counsel for petitioner to argue vehemently that "the undisputed and substantial evidence in the case conclusively shows that neither petitioner nor respondents intended any delivery of any cotton." In view of the testimony and the verdict of the jury counsel's statement is as ridiculous as his disconnected, rambling, lengthy and incoherent argument.

Respondent Thorn testified as follows:

"Q. What was your intention at the time you entered into contracts with these various brokers with reference to the circumstances of the cotton on behalf of Mr. Browne?

"A. To make delivery of that cotton bought and to deliver the cotton that was sold.

"Q. You then expected to spot the cotton that you had contracted to buy?

"A. We did.

"Q. And to deliver the cotton you had sold?"

"A. We did." (R. 417.)

Petitioner Browne testified as follows:

"Q. Mr. Browne, you didn't investigate and ask anybody what it meant that cotton was purchased in accordance with the Rules of the Exchange—you did not ask anybody what that meant?

"A. No.

"Q. And so you did not know it?

"A. No, I did not think or care anything about it. I understood I could take my profits if I wanted to and if I lost I would lose my margin. I don't care anything about the rules down there and did not know that I would ever be interested in them.

"Q. Insofar as the firm of Thorn & Maginnis is concerned you never at any time, by letter, telegram or personally, informed either member of that firm of your intention to gamble and not to deliver or accept the cotton bought or sold, did you?

"A. I never told them I was gambling. I was speculating on the market." (R 640.)

In view of the above testimony it is difficult to see how counsel can say to this Court that "the

undisputed and substantial evidence in the case shows that neither petitioner nor respondents intended any delivery of any cotton." The rules of the Exchange prohibit gambling.

The petitioner, having asserted that the transactions were mere gambling ones, the burden was on him to prove it. The question of whether or not the transactions were gambling ones was submitted to the jury under proper instruction and the jury decided against the petitioner. Said the Court of Appeals in discussing this phase of the case, 272 Fed. at page 952:

> "The business was conducted by telegrams and letters between the parties. Plaintiffs had no interest in the purchases and sales they were directed to make other than as defendant's brokers. Notwithstanding the vehemence of counsel for the defendant, we do not think the correspondence of the parties indicate that the transactions were not intended to be legitimate. The contracts were fair on their face and presumably lawful, and the defendant, having asserted they were wagers upon the fluctuation of the market and were gambling contracts, the burden was on him to prove it. *Clewes* vs. *Jamieson*, 182 U. S. 491."

The above Court adopts the following language from the *Wilhite* vs. *Houston* case, supra, which is as follows:

> "Nothing appeared in the correspondence of the parties or their conferences before the controversy arose to indicate that the trans-

> actions were not intended to be legitimate. The mere fact that no grain was actually delivered or received but that the sales and purchases were set off against others according to the custom of the Exchange, did not show that they were illegal."

Counsel for petitioner states that it is the duty of the Court to look beyond the contracts, rules and customs of the Exchange and denounce it as a gambling venture. Judge Brewer, in *Bangs* vs. *Hornick*, 30 Fed. 97, very pointedly answers this question against petitioner as follows:

> "Counsel for defendants say that it is the absolute duty of the Court to denounce this transaction unless it clearly appears that it was a valid and honest one. I think the duty of the Court is precisely the reverse and that it is the duty of the Court to uphold it unless it appears that it was an invalid and dishonest one."

While it is true that Courts will not lend their aid to a recovery based upon losses arising out of gambling transactions, it is also true, as said by Judge Sanborn in *Claige* vs. *Laidley*, supra, that:

> "It is also the policy to enforce as valid contracts and one who would avoid his agreements and escape his obligations by his own wrong should be required to establish it by clear and convincing proof."

Bearing in mind that the transactions occurred in New Orleans, the legal consequence of these transactions are governed by the laws of Louisiana.

"As regards their legality, sales and purchases of grain in the Chicago market were governed by the laws of Illinois, those in Kansas City market by the laws of Missouri." *Wilhite* vs. *Houston*, supra.

See also

Bond vs. *Hume*, 243 U. S. 15;
Warlten vs. *Brown*, 249 Fed. 48;
Berry vs. *Chase*, 146 Fed. 625.
Conner vs. *Robertson*, 55 Am. Rep. 521

See also the opinion of Judge Johnson delivered in *Browne* vs. *Thorn*, supra.

In Louisiana a contract of purchase or sale of a commodity for future delivery is void if both parties intend it as a wager upon market movements to be settled by differences, but not if only one of them has that intention. This is the general rule in the absence of statute.

Counsel for petitioner contends that the undisputed evidence shows a gambling venture and cites a large number of cases to sustain his remarkable assertion. The analysis of a few cases cited by counsel for petitioner will disclose that the cases upon which he relies are not in point. *King* vs. *Johnson*, 159 Pac. 531, merely decides, quoting syllabus:

> "That an agent cannot recover commissions for an illegal sale of lands in violation of Act

March 15, 1917, Sections 8 and 9, which prohibits the sale or offer for sale of lands by reference to an unrecorded map or plat."

In *Medlin Milling Co.*, vs. *Moffatt Commission Co.*, 218 Fed. 686, cited by petitioner, plaintiff sued its treasurer and the defendant company for money unlawfully and by collusion and conspiracy diverted from plaintiff in gambling transactions. The Court decided the case on the Missouri statute, which declares the contract void **if either of the parties to it had no intention to receive or deliver the property.**

In *Partridge* vs. *Cutler*, 48 N. E. 125, defendant had on hand large quantities of grain contracts and plaintiff demanded of defendant that he put up additional margins, which he refused to do, alleging that there was an agreement between them that he should have credit to the extent of one hundred thousand dollars. All the Court decided in that case was that the Court's instruction which told the jury that if plaintiff made purchases and sale of commodities for future delivery for the defendant on the Chicago Board of Trade, in accordance with its rules and regulations, they should recover, was error, since the instruction omitted material and controverted facts which he should have submitted to the jury.

In *Weare Commission Co.*, vs. *People*, 209 Ill. 528, 70 N. E. 1076, the company was indicted and convicted for running a bucket shop in Princeton,

Ill., contrary to the criminal statute. Defendant introduced no testimony except certain rules and by-laws of the Board of Trade of Chicago. The Court held that where such transactions were carried on in the office of some particular person and with his aid and concurrence a presumption of his knowledge of what is going on, is made by the law without any requirement of proof on the part of the prosecution.

In *Jamieson* vs. *Wallace,* 167 Ill., 388; 59 Am. St. Rep. 302, one of the appellants lived with appellee, a woman of little or no experience in business and a very limited amount of money. Appellee testified that she was told by one of the appellants that he could make some money for her by speculating in stocks. The Court held that from her relations to appellants and from all the circumstances disclosed by the proof that he knew she was dealing in gambling transactions.

Stafford Grain Co., vs. *Rock M. & E. Co.,* 146 Pac. 1139, was an action by plaintiff to recover the price of two carloads of wheat sold to the defendant. Plaintiff, a co-operative farmers' association, had been selling grain to the defendant for about five years. The amounts sold amounted to about two hundred cars. Plaintiff's manager, Van Fleet, who was speculating in wheat, requested defendant, instead of remitting as had been the custom

for five years, to send the money for the two cars to Goffe & Carkaner, who appears to have been running a bucket shop in defendant's building. Geo. Ganeo was conducting the business for defendant, and Paul Ganeo was running the bucket shop. Van Fleet testified that in speculating and advancing money on margin "he usually talked to Paul Ganeo and sometimes with Geo. Ganeo and that he directed one or the other of them to turn over so much money on margins."

Counsel cited *Conner* vs. *Robertson*, supra. This opinion sustains practically every contention made by respondents in the case at bar. Petitioner's contention that he was gambling (although not known to respondents), and that he would have demanded from respondents his money had he won, is answered by the above Court as follows:

> "Defendant's own testimony is sufficient to show that he should have spared his conscience the strain of making the first defense and it needs no further notice."

In *Williamson* vs. *Majors*, 169 Fed. 754, plaintiff was a real estate man living at Memphis, where the speculations occurred. Majors knew that Williamson was a real estate man and not engaged in the cotton business. All of the transactions were given in person by plaintiff to Majors. Majors knew he was gambling. Majors, who appears to have been running a bucket shop, testi-

fied that he advanced Williamson about forty thousand dollars to put up as margins "until Williamson could see what the census report would be."

The case of *Carpenter* vs. *Beal-McDonald & Co.*, 222 Fed. 452, does not pretend to cover the questions involved in the case at bar.

In *Wolfe* vs. *Andrews*, 192 S. W. 266, the contract on its face shows it to be in violation of the statute.

Kirkpatrick vs. *Richer*, 91 S. W. 51, does not in any manner sustain petitioner's contention.

In *Orvis Bros.* vs. *Holt-Morgan*, 91 S. E. 948, the case was reversed on account of improper instructions.

Cohn vs. *Brinson*, 73 So. 59, is not in point, since both Brinson and the bank admit that Brinson was gambling on the rise and fall of the cotton market. The above case was a question of loaning money for an illegal purpose, and they admit the facts were that both parties knew that Brinson was gambling.

In *Harnett* vs. *Wilson*, 161 Pac. 281, it was admitted that defendant was running a bucket shop, that he was not a member of any exchange and that it became necessary to get his customers drunk in order to rob them. It was also admitted by defendant's agent, Marshall, that it was a bucket

hop where only margins were played, and that he nformed the plaintiff that it was "just like a ook" or "a horse race."

Since the undisputed testimony shows that the ansactions were executed in Louisiana on the New rleans Cotton Exchange in conformity with the les and customs of said Exchange, and that re-ondents intended to deliver the cotton if the ntracts were carried to maturity, the Court ould have been warranted in directing a verdict r the respondents.

Springs & Co., vs. *Carpenter*, 154 Fed. 487; *Flower* vs. *Bush & Witherspoon Co.*, 254 Fed. 519.

The Court, however, submitted the case to the y under proper instructions, which told the jury t if they believe by a preponderance of the evi-nce that at the time of the making of the con-cts it was the intention of Browne and the intiffs that there should be no delivery upon the es fixed for such delivery in the contracts, but rely the receipt of the difference between con-ct price and the market price the contract was gal and plaintiffs could not recover. But if it s the intention of Browne not to receive the cot-bought and not to deliver the cotton sold by n, but it was the intent of Thorn & Maginnis t the cotton bought by Browne should be de-

livered to him and that the cotton sold by Browne should be delivered by him, then the mutual intent not to deliver did not eixst and the plaintiffs should recover (R. 651-2). This question then becomes one of fact for the jury. This Court will not on appeal weigh conflicts in the evidence or credibility of the witnesses. *Pierce Oil Corp.* vs. *Taylor*, 264 Fed. 829.

The most astounding legal absurdity is announced by counsel for petitioner in saying that as Browne did not intend to deliver or receive any cotton his legal intention amounts to this: I employ you to make a contract for me wherein you bind yourself as principal without disclosing me, yet I am not liable to you because I had a gambling intention which you knew nothing about. The very opposite to petitioner's contention is the law. Since Browne admits that he did not communicate his illegal intention not to deliver the cotton to respondents, the law does not in the absence of proof presume that the parties are gambling. As was said in *Conner* vs. *Robertson*, supra,:

> "The law presumes that the true intention of the parties is that which is expressed upon the face of their contract, and also that men in their business transactions do not intend to violate the law, make contracts for the enforcement of which the law refuses a remedy."

Petitioner attempts to stamp the transactions as illegal because there was no testimony intro-

duced to show what the intention of the other principals was. It was not disputed that the other principals with whom petitioner dealt were members of the New Orleans Cotton Exchange and the contracts that they entered into were in conformity with the rules and customs of that Exchange. The contracts were therefore fair on their face and presumably lawful, and the law does not presume that the parties were gambling. If the petitioner believes that the other parties to the contract were gambling he should have introduced their testimony at trial. The burden of proving the illegality of these transactions was on the defendant. As was said by Justice Miller in *Rountree* vs. *Smith*, 108 U. S. 269:

> "The other party to these contracts, or rather parties, for the contracts were numerous, was not introduced nor their testimony given, and there is no direct evidence that any of them either bought or sold with any other purpose than to perform the agreement as its terms bound them."

Counsel for petitioner contends that because respondents purchased for petitioner during a period of four months a large quantity of cotton, which contracts were settled by payment of differences, that this fact proves the particular contracts sued on were gambling transactions. There is no merit in his argument, as shown by the following decisions:

Cleige vs. *Laidley*, supra.

Chicago Board of Trade vs. *Cristie Grain & Stock Co.*, 198 U. S. 236;

Lehman vs. *Feld*, 37 Fed. 852;

Board of Trade vs. *Kinsey Co.*, 130 Fed. 507;

Rountree vs. *Smith*, 108 U. S. 269.

He also contends that because many sales and purchases were made conditioned on the loss or sale by stop at a certain figure that this of itself is conclusive evidence that it is gambling on the rise and fall of prices. Again counsel for petitioner falls in error. He cites no authority for holding that a stop order is illegal.

9 C. J., at page 529, under the head of Stop Orders, says:

> "A client may order that a sale be made whenever the stock reached a certain price or on the event of certain conditions, and the broker must sell whenever the price or condition occur or render himself liable for any resulting loss, and client's order to buy-in May also begin in the form of a stop order."

See also *Horton* vs. *Morgan*, 75 A. D. 321, where the Court gives an illustration of a stop order.

VIII

The question argued by counsel for petitioner under this title is discussed by us under title VII.

IX

Petitioner's contention that the Court erred in holding in his charge to the jury that the intention not to deliver must exist in both petitioner and respondents is discussed elsewhere in this brief.

X

Counsel for petitioner contends now for the first time that since the petitioner deposited money in a bank in Arkansas to the credit of respondents this transaction necessarily makes it an Arkansas contract and in violation of the Arkansas law. He cites no law, and of course cannot do so, to uphold such an absurdity. The depositing of money had nothing to do with the contract made in New Orleans. It was mere incident that followed the contract. The contract could have been fully performed in New Orleans without the deposit of money in Arkansas .

XI.

Petitioner's argument that the United States Court will not enforce in the State of Arkansas a contract which is illegal under the laws of that State even though the contract be valid in Louisiana is answered under titles VII and X.

XII.

Counsel says that the Court erred in giving the jury the following instructions:

> "Reference was made in the testimony to what is termed hedging. Hedging is a means by which collectors, owners and exporters of cotton or other products and manufacturers, who make contracts in advance for the sale of their goods, secure themselves against the fluctuations of the market by counter contracts for the purchase or sale, as the case may be, of an equal quantity of the products or of any material of manufacture. Such contracts are legal, and if you find from the testimony that the contracts in this case were hedging contracts then they were legal and enforcible, or if you find that the plaintiff believed that they were hedging contracts they were legal and enforcible."

Because the Act does not specifically authorize a hedging contract he argues for this reason that "it is necessarily a violation of the law." It does not necessarily follow that because the Act does not specifically authorize hedging that "the contract is a violation of the law." It it were lawful to hedge prior to the enactment of the Act and the Act does not prohibit it the contract is not a violation of the law. Hedging does not make an illegal contract. It is no more damnatory than is insurance. The instruction complained of is the law as declared by Justice Holmes in Chicago *Board of Trade* vs. *Christie, etc.,* supra.

The position is not well taken for the further reason that this matter was brought out by the petitioner on cross examination of witness Thorn.

If it was error it was an invited one and the petitioner cannot complain.

XIII.

The alleged error of the Court in refusing instructions based upon the Cotton Futures Act requested by counsel for petitioner are discussed elsewhere in this brief.

XIV.

The Court should have refused petitioner's request No. 7. A sufficient answer to this argument may be found in the case of *Thorn* vs. *Browne,* 257 Fed. 519, and *Hutton* vs. *Terrell,* 255 Fed, 860.

XV.

The Court did not commit error in refusing petitioner's request No. 8. There is no testimony on which to base this instruction "to stop his losses on one hundred bales at 17.20 and one hundred bales at 17.15." There is no evidence that he had any loss at 17.20. As a matter of fact, he had a profit even at 17 cents. Witnesses Kehoe, Coleman, Thorn and Barkdull testified that petitioner's telegram of February 1st, 1917, reading "Stop ten at 17.20 and ten at 17.15," meant, according to the rules and customs of the New Orleans Cotton Exchange to sell at the opening of the market at these prices, if possible, or the next best possible

price. Petitioner offered no proof to contradict the above witnesses.

XVI.

Petitioner's request No. 13 was covered in the trial Court's general charge.

XVII.

The Court committed no error in refusing petitioner's request No. 14. This question has been previously discussed by us.

XVIII

This question was fully discussed under title XII of our brief.

XIX.

The Court did not commit error in refusing the defendant's right to recover on his counter-claim. Petitioner admits he was gambling.

As was said in *Higgins* vs. *McCrea*, 116 U. S. 671:

> "We do not see on what ground a party who says in his pleadings that the money which he seeks to recover was paid out for the accomplishment of a purpose made an offense by the law and who testified and insists to the end of his suit that the contract on which he advanced his money was illegal, criminal and void, can recover it back in a Court whose duty it is to give effect to the law which the party admits he intended to violate."

Since Browne admits he was gambling the Court committed no error in instructing the jury to find against him on his counterclaim.

CONCLUSION

As this Court takes judicial notice of the manner in which business is conducted on the great future Exchanges of the country we deem it proper to set out here some of the facts of common knowledge respecting the New Orleans Cotton Exchange and the system of making cotton contracts for future delivery in general.

The New Orleans Cotton Exchange is a corporation limited to 500 members. The Exchange does no business itself. It merely furnishes the means whereby its members can regulate themselves under the sanction of law. Of the membership the most important to the public are those who make contracts on the Exchange for non-members. These are called commission merchants, or commission houses, and constitute a small proportion of the total membership. Of such were the respondents.

The members deal with each other as principals without disclosing the names of their customers. This practice is true of all the great grain and future Exchanges of the world and has been so from their origins. The broker holds himself out to his customer as responsible for the faithful execution of the contract notwithstanding any default or neglect of the broker with whom he made the contract. In thus assuming liability to his

customer for a default not ordinarily chargeable to an agent, he exacts the reciprocal right to substitute other parties in the place of the one with whom he originally contracted, and speaking in legal terms this unusual guaranty to his customer is the consideration for the right to substitute new parties on the other side of the contract.

The contracts are all executed on the floor by open outcry. None can be made secretly. On the same day as made they are reduced to writing and signed by both parties. For convenience they sign a short form or slip carrying all the obligations of the longer form set out in the rules. As soon as a contract is made the price is posted on a bulletin board and flashed by telegraph over the country. The Exchange isues a bulletin each day showing the time at which every transaction was made.

The contracts are for 50,000 lbs. of cotton for delivery at a time not more than 11 months distant and they are sold in cents and hundredths of a cent per pound. The rules and by-laws of the Exchange are an integral part of them and they are also made subject to the United States Cotton Futures Act. Under that Act the cotton tendered on contract must be graded by agents of the Department of Agriculture and must be within the grades specified by the Act, and the differences between the grade called for by the contract which

is middling and other grades tendered must be settled for according to the method prescribed by the Act, but the other details respecting delivery are largely controlled by the rules of the Exchange. The rules of the Exchange show that the contract specified by the Cotton Future Act has been adopted by the Exchange and were the Act, for any reason held invalid, that fact would not necessarily destroy the contract itself. It would then have to be judged on its merits as a contract duly adopted by the Exchange.

Contracts, after being brought into existence, are settled in just two ways, by actual delivery of the cotton, or by set-off. Actual delivery needs no explanation. But the settlement by set-off as it is the cause of all adverse criticism, needs careful attention.

Set-off occurs where two brokers are obligated to deliver to each other the same amount of cotton at the same time. "Ringing out," which is but another name for set-off, occurs where three or more brokers are similiarly obligated This Court has explained and illustrated both methods of settlement in Christie vs. Board of Trade, Supra and declared in that opinion that it serves the same purpose as would an actual delivery.

When a customer having bought a contract, later on sells a contract for delivery at the same time, it is called in the vernacular, a "close out."

A mistaken impression prevails that the customer actually closes out or terminates the contract he first made. This is not the fact. The effect of his second contract is to make a new but exactly opposite contract, which, so far as the customer is concerned, can be used to offset the first contract. But the broker may be left, for a time at least, obligated to both.

The critical would probably argue that the customer should not be allowed to make a counter transaction because the result of it is to permit him to get in and out without taking or making an actual delivery of the cotton. But it may be asked, if one is to be permitted to buy a contract, why should not one at some later time be allowed freely to sell a contract. And if it be answered, as of course it ought to be answered, that he should be free to either buy or sell, then what purpose would be served, in a case where he had bought and sold the same quantity for the same time of delivery, to compel him to deliver to himself and to receive from himself? And which would he first do? Both law and common sense requires him to do neither. Yet we admit that there are critics who would contend that in such a case, in order to obviate suspicion of his motives, the customer ought to be made to lug the actual cotton down to the Exchange and deliver it to himself.

The fact that contracts may be offset is re-

sponsible for the plea of wagering made in this case and all other cases of a similar kind. In fact all the evidential facts relied upon to prove a wager must at least be tested by the question of the legality or illegality of set-off.

We say this despite the fact that none of the physical facts attending the making or settling of contracts has anything to do with determining the question of their legality. That is to be determined by such intangible things as thoughts, motives, intentions, and what not. Wagering is a state of mind existing independently of the contract itself. In order to make them a wager we must import into them a motive to be found only in the minds of the parties to it. But without the physical fact of set-off the mental state of wagering, if there be such a thing, could not exist. It might well be called the proximate cause without which the mental disorder could not come into being. So, while apparently having nothing to do with the question, set-off has in truth all to do with it. It is the invisible germ that generates the disease.

Let us explore this idea a little further. The petitioner shows that he has settled previous contracts made through respondents without making or taking an actual delivery; his purpose was the same with respect to the cotracts in controversy, and argues from this premise that respondents

should have known that his intention was not to take or make delivery in any event. But this contention does no more than raise the question of the legality of setting off the contracts. Petitioner would be the first to admit that if actual delivery had in fact been made, he would have no cause of complaint. But he complains of settlement by set-off which this Court has held to answer every legal purpose of an actual delivery. Petitioner could not afford to admit this self evident proposition. To do so would destroy his theory. But it demonstrates that set-off is the root of the matter.

Though deprived of any beneficial implication that might flow from proof of the fact that no delivery was made, that a settlement by offsetting is not contrary to law, the petitioner contends that he is entitled to show such words and acts as pasesd between himself and respondents that might tend to show a guilty purpose on his part and knowledge of it on the part of respondent. We do not deny his right to do so, if any such can be found. But after all, if any such could be discovered, and we submit that there are none in the record, they would tend to prove but one thing; that the contracts were offset. From whatever angle one views it, it comes down to a consideration of set-off. Set-off makes speculation possible.

But speculation on one of these great future Exchanges is not the same thing as gambling.

Through the facilities of the great modern future contract exchanges the great staple commodities such as grain and cotton move from producer to consumer among what may well be called a speculative route. The speculator pours in his money, in the hope of gain, and thus carries a considerable part of the risk as the crops move from a raw to a finished state. He does not furnish the vast sums necessary to finance the movement; the banks do that; but he does furnish the money and the indirect ownership that carries the risk. The risk must be carried by some one. Hence the exchange and hence the speculator.

Now what is a speculation? It is trite to say that it is the buying of something in the hope that it will advance in value, or the selling of something from the fear, or hope, that it will decline. But when we come to consider the definition of a speculator we find some authorities inclined to impute to him not alone these simple motives, but if he is really to be worthy of his name, a kind of superior intelligence and competency in the doing of them. In other words he is a person endowed with a special ability to forecast the future, and what he does is speculation because of these particular mental traits. Under this definition the less competent necessarily must be gam-

blers, and the things they do, gambling. But the difference between gambler and speculator is not purely mental, a mere difference in the quality of their minds. There is a difference and it is to be found in the effect of what they do and not by whom it is done.

Gambling is the passing of money from one person to another upon the happening or not happening of some event. The money is invested in nothing, not even the event. It does not influence the event one way or the other. One person wins what the other person loses.

In speculation money is invested in the right to property and what happens to that property thereafter is the thing that counts. In gambling what one loses another necessarily gains while in speculation what one loses nobody may gain and what one gains nobody may lose. Here is the essential difference between the two. This vital distinction is the crux of the whole matter because it shows the difference between wagering or gambling contracts and valid, or speculative transactions.

Speculation on the cotton Exchange can best be illustrated by examples, and we shall now set forth several in an effort to show that a speculator thereon may either win or lose money and no one else be effected adversely. At the same time we will

grasp the opportunity to illustrate a "hedge" contract.

Let us assume that at a little town in Georgia ten farmers drive in the same day; each with ten bales of cotton, and sell it to the local merchant at the prevailing market price of 16 cents per lb. They turn over the actual cotton to the merchant, take their money and go home. Now can it be argued that these farmers have any further interest in this 100 bales of cotton? We ask this question, because some doubting Thomas will want to return to the farmers and contend they have lost any money the speculator may make out of it. But when you ask them if the converse of the proposition obtains, that is to say, should the farmers reimburse the speculators for any money they may have lost on the cotton the fallacy is immediately exposed. Forward then with the illustration.

The local merchant having bought this cotton at 16 cents and not being able to sell it to an exporter or a mill at the moment, and wishing to protect himself against a decline in price, sends an order to H & Co., members of the Cotton Exchange, to sell 100 bales for January delivery at the market, which means at the price obtainable, and it is done at 17 cents per lb. The local merchant has "hedged."

We will now introduce a speculator and give him an opportunity to show the useful function he

plays in the system. Let us suppose that he lives in Chicago and has no sort of interest in cotton except as it may furnish an opportunity for speculation. He, therefore, sends an order to B. & Co., members of the Exchange, to buy 100 bales for January delivery; the order arrives at the same time as the local cotton buyers, and the speculator becomes the purchaser of the 100 bales sold by the Georgia cotton merchant. Now, as long as the parties hold their respective positions, the speculator carries the risk of the 100 bales of spot cotton, and anything that happens to the value of it, will affect the speculator alone. Of course he does not know that he owns the equity in one hundred bales of cotton located way down in Georgia. He may think, as some of them in their ignorance do, that the contract represents no more than a mere scrap of paper.

Having got the Georgia merchant and the Chicago speculator together at 17 cents we will march on a few days and give the cotton market a chance to advance to 18 cents per lb. This price give the sspeculator $500 profit, less the commision and the government tax, which expenses we will throw out of the example in order to simplify it. This price also gives the Georgia merchant $500 loss on his future contract, but if the parity between spots and futures has been maintained, he has a profit of $500 in his spots, or in other words, he is just where he started. We will assume

that the speculator decides to take his profit and accordingly sends an order to sell 100 bales of January. At the same time, the Georgia cotton merchant, having sold his 100 bales of spot cotton to an exporter at a profit over the purchase price of $500, also sends an order to his broker to buy 100 bales of January. To make the example easier of comprehension, we will have them again cross each other at the price of 18 cents per lb. This winds up the transaction and leaves us to take stock of the result.

We find that the speculator has made $500 and no one has lost it. It is true that the Georgia merchant lost $500 on his future contract but he makes it back on his spots. He comes out of the transaction even.

The example may also be reversed to show the speculator losing $500 and nobody gaining it. All that is necessary to reach this result is to suppose that the two parties mentioned closed out their futures at 16 cents per lb., instead of 18 cents. In this case the speculator would have lost $500 and the merchant would have gained that amount from his future contract only to lose, however, an equal amount on his spots.

The foregoing examples, showing as they do, how the speculator can both win or lose, and no one else be affected to his disadvantage thereby; also makes manifest the beneficial role played by

the speculator in the movement of the cotton from producer to consumer.

It may be true that when speculator meets speculator on the exchanges no economic good results; that this situation would bring about in effect the same result as would a wagering transaction. But it may be said that this possibility inheres in the very nature of the problem. So long as speculation is permitted, or is suffered, because of the benefits it confers by broadening the market—furnishing buyers and sellers when they are most needed—an excess of speculators will at times be found among the traders. Human ingenuity has not as yet been able to devise a scheme to limit speculation to the amount required to meet business needs without possibility of excess. The difficulty of obtaining such an ideal balance is manifest. The flow of both hedging contracts and speculative contracts is naturally variable. At times the weight of hedging contracts may be greater than the market can absorb without a disturbance in price. At such times the market suffers from a lack of speculative absorption. At other times, particularly in great upward movement, there is an excess of speculation and no doubt such occasions furnish frequent examples of speculator dealing with speculator. Since, however, speculation contributes to the market a real economic good, the mere fact that at times

it exceeds the requirements, by bringing into being contracts that possibly perform no useful function, should not lead to the condemnation of the entire system. Properly speaking, however, this is a question for the law makers and not for Courts. And we shall see that Congress has answered it.

The law in such cases as this is, that the illegality of the contracts must be determined by the ascertainment of a wagering purpose existing in the minds of the petitioner at the moment of making the contract, and a contemporaneous knowledge of such a guilty purpose by his agent, the respondents. Now, we must take the law as we find it, and probably we should not complain of it in this case, because the petitioner has failed to meet the test, but in this high Court, where precedents may be corrected, we feel obliged to take this opportunity to observe that the rule ought to be modified. The test should be, did the agent make valid contracts. And if found to be valid, the principal ought to be estopped from claiming that, nevertheless, he made them with a guilty purpose. The present rule invites dishonesty and provokes confusion. The agent may have made a contract legal in every respect and in itself subject to no just criticism, but in an action, such as this, to recover for services and money paid out on such contracts, he may be met, as here, with the defense that notwithstanding the validity of the contracts when tested independently, they

are made illegal because of an infirmity in the principal's mind.

Under the present rule, principal A. can make a contract with principal B. through their respective brokers, and in an action by the brokers against each of them, A. may be found to have had a wagering intent, and his obligation therefore invalid, while B may be found to have had a bona fide intent, and his obligation therefore valid. Such a situation is absurd and the rule should be clarified.

Counsel for the petitioner frequently asserts in his brief that the Cotton Futures Act was designed by Congress to suppress gambling in futures. Conceding the fact that he uses the word as a synonym for speculation we point out that there is not a word in the Act to support this contention as to either gambling or speculation. A reading of the literature of the subject while it was being considered by Congress, as well as the Act itself, will disclose the actual motive to have been the elimination of certain low grades of cotton then tenderable on contract and also the fixing of an elastic instead of a rigid method of ascertaining the difference to be paid for cotton grading above or below the basic grade, middling. The real, though perhaps not clearly expressed purpose, was to make a contract that would sell above the price of spot cotton and thus exercise

a beneficial influence upon the latter instead of selling below spot cotton and exercising a depressing influence upon it as was then the case. A further reading of the history of the subject covering the years preceding the first passage of the Act (in 1914) will disclose that the House did, in that earlier period, seriously contemplate the restriction of speculation. The House passed two Acts containing such restriction but they failed in the Senate. In the meantime elaborate hearings were held by committees and a searching investigation of the cotton exchange was conducted by the Department of Agriculture. These investigators all reported that a suppression of speculation on the Exchange would probably result in greater harm than good to the producers of cotton. The sentiment against speculation not only subsided but veered completely around. In place of suppressing cotton futures Congress now undertook to make them more valuable. In place of suppressing speculation, it approved it. The same thing is true of the grain futures Act which the Court held unconstitutional in *Hill* vs. *Wallace* at the last term. It is also true of the grain futures Act which was re-enacted by Congress in September 1922. The debates in Congress frankly disclose that there was no purpose to prohibit speculation. The debates are unnecessary, however, as the wording of the Acts show there was no such purpose.

It is perfectly apparent that Congress has come to the solemn conclusion that speculation on the future exchanges should not be unduly hampered. It can be fairly said that the policy of Congress is to approve speculation on these future exchanges.

It is respectfully submitted that the cause should be affirmed.

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